



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 21, 2012

Ms. Pat McGowan
For the City of Fredericksburg
Attorney at Law
P.O. Box 836
Fredericksburg, Texas 78624-0836

OR2012-07654

Dear Ms. McGowan:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 454296.

The City of Fredericksburg (the "city"), which you represent, received a request for certain information pertaining to three specified job postings. You state you have released some information to the requestor. You state you will redact social security numbers pursuant to section 552.147 of the Government Code.¹ You claim some of the submitted information is excepted from disclosure under sections 552.102 and 552.117 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative

¹Section 552.147 of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

²Although you raise section 552.024 of the Government Code as an exception to disclosure, we understand you to claim section 552.117 of the Government Code, as this is the proper exception for the substance of your argument.

sample of information.³ Additionally, you state release of this information may implicate third party interests. Accordingly, you have notified the interested third parties of the request for information and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have received and considered comments from an interested third party.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."⁴ *Id.* § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find a portion of the submitted information, which we have marked, is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold this information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, you have failed to demonstrate any of the remaining information is highly intimate or embarrassing and a matter of no legitimate public interest. Therefore, no portion of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

You raise section 552.102 of the Government Code and we understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In

³We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546, 549–51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court then considered the applicability of section 552.102 and held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Id.* at 347. We note section 552.102 is only applicable to employees of a governmental body. Upon review, we find the city must withhold the date of birth we have marked under section 552.102(a) of the Government Code. We note that you indicate the responsive information includes the applications of the individuals who were ultimately hired. Therefore, to the extent the responsive information includes the dates of birth of the city's new hires, the city must also withhold the dates of birth of those city employees under section 552.102(a) of the Government Code. However, to the extent the remaining information at issue does not pertain to individuals who are employed by the city, the remaining information may not be withheld under section 552.102(a).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former official or employee of a governmental body who timely requests this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). We note a post office box number is not a "home address" for purposes of section 552.117(a). *See* Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov't Code § 552.117 is to protect public employees from being harassed at home). We also note the protections of section 552.117 only apply to information that the governmental body holds in its capacity as an employer. *See* Gov't Code § 552.117(a)(1) (providing that employees of governmental entities may protect certain personal information in the hands of their employer). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information or not later than the 14th day after the date on which the employee began employment with the city. *See* Gov't Code § 552.024(b). Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the information we have marked pertains to a city employee who timely requested confidentiality under section 552.024, the city must withhold the marked information under section 552.117(a)(1). Further, to the extent the responsive information includes the home address and telephone number, emergency contact information, social security number, or

family member information of the applicants who were ultimately hired, the city must withhold such information under section 552.117(a)(1) if the individuals at issue timely requested confidentiality under section 552.024. Conversely, to the extent the individual whose information we have marked, or the individuals who were ultimately hired for the job postings at issue, did not timely request confidentiality under section 552.024, the city may not withhold their personal information under section 552.117(a)(1). However, we find no portion of the remaining information constitutes the home address and telephone number, emergency contact information, social security number, or family member information of a current or former official or employee of the city. Accordingly, none of the remaining information may be withheld under section 552.117(a)(1) of the Government Code.

We note some of the remaining information is excepted under section 552.130 of the Government Code, which provides information relating to a motor vehicle operator's or driver's license or permit, title, or registration issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130. Accordingly, the city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.137 provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)–(c). Accordingly, the city must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its release.

In summary, the city must withhold the marked information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The city must also withhold the date of birth we have marked, and the dates of birth of the city's new hires, under section 552.102(a) of the Government Code. To the extent the individual at issue timely requested confidentiality, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The city must also withhold the personal information of the city's new hires under section 552.117(a), to the extent they timely requested confidentiality. The city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code and the e-mail address we marked under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its release. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle R. Garza", with a long horizontal flourish extending to the right.

Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/em

Ref: ID# 454296

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Tammie R. Colvin
422 China Street
Center Point, Texas 78010
(w/o enclosures)